

STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

Murphy, P.J., and White and Smolenski, JJ.

MUNICIPAL EMPLOYEES RETIREMENT
SYSTEMS OF MICHIGAN,

Petitioner-Appellee,

v

CHARTER TOWNSHIP OF DELTA,

Respondent-Appellant.

Supreme Court No. 129041
Court of Appeals No. 260534-L
Tax Tribunal No. 00-306773

REPLY BRIEF - APPELLANT

ORAL ARGUMENT REQUESTED

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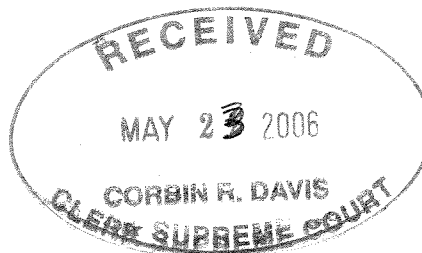


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I. MERS FAILED TO CLEARLY AND CONVINCINGLY ESTABLISHED THAT MCL 211.7m GRANTS AN EXPRESS TAX EXEMPTION FOR ITS INVESTMENT PROPERTY.

MERS is a public corporation charged with the responsibility of holding and investing the assets of public pension plans. At issue in this case is whether MERS is clearly entitled under MCL 211.7m to a statutory exemption from real property taxes when it owns and holds land as an investment. MCL 211.7m requires that real property owned by a public entity be "used for" or "used to carry out" a public purpose to qualify for the tax exemption. Delta Township argues, as this Court recently recognized, that "tax exemptions upset the desirable balance achieved by equal taxation" and "must be narrowly construed." *Wexford Medical Group v City of Cadillac*, ___ Mich ___; ___ NW2d ___; 2006 Mich LEXIS 907 (2006). Consequently, because MERS has failed to prove that MCL 211.7m expressly and clearly grants the exemption it seeks, MERS' investment property is subject to taxation.

A. MERS Endorses a Strained and Illogical Interpretation of MCL 211.7m.

MERS' interpretation of MCL 211.7m leaves much to be desired. For example, MERS asserts that:

Unlike entities seeking exemption under the first clause [of MCL 211.7m], those seeking exemption under the second clause do not have to "use" the property for a public purpose, but only to "carry out," i.e., to further, a public purpose. Brief for Appellee, p 14.

MERS' analysis of MCL 211.7m ignores the fact that the second clause of the statute, upon which MERS relies, provides that a tax exemption is granted to land owned by entities such as MERS when the land is "*used to* carry out a public purpose." MCL 211.7m (emphasis added). Thus, the "use" of the property is very much a prerequisite under both the first *and* the second

clauses of MCL 211.7m. MERS incorrectly disregards the Michigan Legislature's inclusion of the word "use" in the second clause, an interpretation that would contradict the plain language of the statute and basic principles of statutory construction. Instead, MCL 211.7m clearly provides that property must be "used" in order to qualify for a tax exemption.

MERS also asserts, without citing any supporting legal authority or convincing logic, that the phrase "carry out" in the MCL 211.7m's second clause dictates that instrumentalities and similar governmental entities "should have their exemptions determined under a less stringent standard." Brief for Appellee, p 14. MERS apparently interprets the phrase "used to carry out" as being more broad or liberal than the phrase "used for." *However, there is no court decision, legislative history, or other legal authority that supports MERS' argument.* MERS merely makes the bald assertion, unconvincingly and without citing to any legal authority, that the Legislature's inclusion of the words "carry out" in the second clause of MCL 211.7m implies a lower standard or threshold for the exemption granted for land owned by public instrumentalities than for municipalities.

A more logical explanation for the Legislature's inclusion of the phrase "carry out" is that the Legislature considers that phrase to be a "term of art" with respect to agencies, authorities, and other instrumentalities of more fundamental municipalities (such as cities, villages, townships, etc., which are addressed in MCL 211.7m's first clause). This explanation is supported by the Legislature's use of similar language in MCL 211.7aa, which grants a tax exemption for property used by a municipal water authority. Under MCL 211.7aa, land is exempt from taxation if it is "*used* [by the water authority] *to carry out* a public purpose itself or on behalf of a political subdivision, a combination of political subdivisions, or a combination of 1 or more political subdivisions and the state." MCL 211.7aa (emphasis added). Note that the language used by the Legislature in MCL 211.7aa is

comparable to that in MCL 211.7m's second clause.

Consequently, a more plausible interpretation of the phrase "carry out," as used by the Legislature in both statutes, is that the Legislature perceives agencies, authorities, and other instrumentalities (such as MERS and water authorities, among others) as being established to "carry out" public purposes *on behalf of* the entities that created them. Thus, the phrase "carry out" is synonymous with the word "perform," and carries the connotation that the performance of the public purpose is done on behalf of another entity or entities. In other words, under MCL 211.7m, property owned by an instrumentality such as MERS is exempt from taxation if it is *used to perform* a public purpose. This explanation is supported by logic, and, in contrast to MERS' argument, does not require that language used in MCL 211.7m be disregarded or that the meanings of certain words be "watered down."

Regardless, MERS' argument that "instrumentalities . . . should have their exemptions determined under a less stringent standard" than municipalities (Brief for Appellee, p 14) contradicts the plain language of MCL 211.7m, the accepted interpretation of that statutory subsection by Michigan courts, and the presumption against tax exemptions that is well established in Michigan law, as Delta Township has briefed in this Reply Brief and in its Brief on Appeal. MERS' plea for a "less stringent standard" belies the established legal principle that tax exemptions "will never be implied from language which will admit of any other reasonable construction." *Ladies Literary Club v Grand Rapids*, 409 Mich 748, 754; 298 NW2d 422 (1980).

MERS claims that it "urges no more than a straightforward reading of the statute as written." Brief for Appellee, p 14. Delta Township agrees, but argues that such an interpretation dictates that the Court of Appeals' decision in this dispute be reversed and MERS be denied the tax exemption

it seeks for its investment property. A fair reading of MCL 211.7m does not result in the conclusion that the statute clearly and unmistakably provides a tax exemption for MERS' investment property.

B. MERS' Permissive Authority to Invest in Real Property Does Not Establish a Tax Exemption under MCL 211.7m.

MERS is statutorily permitted to acquire real property as an investment under the Municipal Employees Retirement Act of 1984 ("MERA"), MCL 38.1501, *et seq.*, and the Public Employee Retirement System Investment Act ("PERSIA"), MCL 38.1132, *et seq.* Neither statute mandates that MERS acquire real property investments as part of its statutory duties, nor do they expressly grant MERS a tax exemption when it invests in land. Nevertheless, MERS claims that these statutes, when read together with MCL 211.7m, create a unique tax exemption that "singularly applies to MERS by the very nature of MERS [sic] enabling legislation." Brief for Appellee, p 25.

The flaw in MERS' (and the Court of Appeals') reasoning is that the issue at hand is not whether MERS' investment activities carry out a public purpose. Instead, the pertinent issue is whether MERS' vacant investment lands are *used* for, or to carry out, a public purpose as contemplated by MCL 211.7m during the time period when they sit idle and vacant. MCL 211.7m should be construed consistently throughout the entire class of entities to which it applies. If the plain language of MCL 211.7m does not clearly and convincingly convey a tax exemption for unused property that is held only for investment purposes, then this Court should not read additional meaning into MCL 211.7m based on MERS' enabling legislation, especially when the enabling legislation is silent as to real property taxation.¹

¹As noted in Delta Township's Brief on Appeal, had the Michigan Legislature intended to grant MERS an exemption for its investment property, it could have included an express provision in MERA or PERSIA, as it has in other enabling acts for instrumentalities and authorities.

C. **"Beyond a Reasonable Doubt" Is the Appropriate Standard of Proof.**

In its Brief on Appeal, Delta Township cited this Court's opinion in *Ladies Literary Club* for the principle that "an alleged grant of [tax] exemption will be strictly construed and cannot be made out by inference or implication but must be *beyond reasonable doubt*." *Ladies Literary Club, supra*, at 754; 298 NW2d 422 (1980) [quoting 2 Cooley on Taxation (4th Ed.), p 1403, § 672] (emphasis added). This passage was also quoted favorably by this Court in *In re D'Amico Estate v Michigan*, 435 Mich 551, 571; 460 NW2d 198 (1990), and *Detroit v Detroit Commercial College*, 322 Mich 142, 148-49; 33 NW2d 737 (1948).

Contrary to this Court's clear direction on this issue, MERS argues that the correct standard of proof is a "preponderance of the evidence." Brief for Appellee, p 10. A year before this Court issued its opinion in *Ladies Literary Club*, the Court of Appeals held that the "beyond a reasonable doubt" standard applies only to those tax cases where a petitioner seeks to establish that a certain class is exempt from taxation. *Retirement Homes of the Detroit Annual Conference of the United Methodist Church, Inc v Sylvan Twp*, 92 Mich App 560, 563; 285 NW2d 375 (1979). When a petitioner seeks to establish membership in an already exempt class, by contrast, the court held that the correct standard is a "preponderance of the evidence." *Id*. The Court of Appeals derived that burden of proof from Section 75 of the Administrative Procedures Act, which, it reasoned, applies to the "'quasi-judicial' proceedings of the Michigan Tax Tribunal." *Id*. See also MCL 24.275.

This Court has not restricted its use of the "beyond a reasonable doubt" standard in the manner announced by the Court of Appeals in *Retirement Homes*. In fact, *Ladies Literary Club* involved an entity that sought membership in an already tax exempt classification under MCL 211.7(d). Under the rule advanced by the Court of Appeals in *Retirement Homes*, the appropriate

standard of proof should have been a preponderance of the evidence. Instead, this Court opined that:

"'Taxation, like rain, falls on all alike. True, there are, in any taxing act, certain exceptions, certain favored classes, who escape the yoke. But one claiming the unique and favored position must establish his right thereto beyond doubt or cavil.' *In re Smith Estate*, 343 Mich 291, 297; 72 NW2d 287 (1955)." *Ladies Literary Club*, *supra*, at 754 [(quoting *American Concrete Institute v State Tax Comm*, 12 Mich App 595, 607; 163 NW2d 508 (1968))].

Quoting Justice Cooley's treatise on taxation, the opinion continues:

'An intention on the part of the legislature to grant an exemption from the taxing power of the state will never be implied from language which will admit of any other reasonable construction. Such an intention must be expressed in clear and unmistakable terms, or must appear by necessary implication from the language used, for it is a well-settled principle that, when a special privilege or exemption is claimed under a statute, charter or act of incorporation, it is to be construed strictly against the property owner and in favor of the public. This principle applies with peculiar force to a claim of exemption from taxation. Exemptions are never presumed, the burden is on a claimant to establish clearly his right to exemption, and an alleged grant of exemption will be strictly construed and cannot be made out by inference or implication but must be *beyond reasonable doubt*.' 2 Cooley on Taxation (4th ed), § 672, pp 1403-1404. *Id.* at 754 (emphasis added).

This Court's continued devotion to the above rule of law indicates that the "beyond a reasonable doubt" standard remains viable in tax exemption matters before this Court, including the instant case.

Despite this Court's opinion in *Ladies Literary Club*, the Court of Appeals continues to follow its holding in *Retirement Homes* [but see *Michigan United Conservation Clubs v Lansing Twp*, 129 Mich App 1, 11; 342 NW2d 290 (1983), modified 423 Mich 661; 378 NW2d 737 (1985)]. For example, in *Promed Healthcare v Kalamazoo*, cited by MERS on page 10 of the Brief for Appellee, the Court of Appeals explained that "the *Ladies Club* decision did not directly consider

the appropriate burden of proof in tax exemption cases, and merely included the above quotation during its general explanation of tax exemption principles." *Promed Healthcare v Kalamazoo*, 249 Mich App 490, 493; 644 NW2d 47 (2002). The Court of Appeals seemingly continues to follow the rule established in *Retirement Homes* because "[a] decision by any panel of [the Court of Appeals] is controlling precedent until a contrary result is reached by this Court or the Supreme Court takes other action." *Holland Home v Grand Rapids*, 219 Mich App 384, 394; 557 NW2d 118 (1996). This Court is not bound to follow the Court of Appeals' adherence to the "beyond a reasonable doubt" standard, especially when doing so would contradict key aspects of Supreme Court precedent that remain good law.

D. This Court's Prior Decisions Supply the Correct Legal Authority.

In the Brief for Appellee, MERS inexplicably dismisses this Court's established precedent regarding MCL 211.7m in short order, wrongly asserting that this Court's decisions in *Traverse City v East Bay Twp*, 190 Mich 327; 157 NW 85 (1916), and *Rural Agricultural Sch Dist v Blondell*, 251 Mich 525; 232 NW 377 (1930), are "wholly inapplicable to the instant issue." Brief for Appellee, p 23. In both cases, this Court decided that undeveloped land owned and held by a public entity solely for future use does not qualify for a tax exemption because the property at issue was not presently used for public purposes. *Traverse City, supra*, at 331; *Blondell, supra*, at 527.

Both *Traverse City* and *Blondell* involved the statutory predecessor of MCL 211.7m, which provided:

The following real property shall be exempt from taxation . . . Lands owned by any county, township, city, village or school district and buildings thereon, used for public purposes. 1 Comp. Laws 1915 §4001. Re-enacted in Act No. 331, Pub. Acts 1919, Act No. 55, Pub. Acts 1925, and Act No. 118, Pub. Acts 1927. See *Blondell, supra*, at 526; *Traverse City, supra*, at 328.

The predecessor version of MCL 211.7m that was at issue in *Traverse City* and *Blondell* contained the same "used for public purposes" requirement at issue in the present case. Further, the issue under consideration in both of those cases was the same as in the instant dispute, namely, whether vacant land not presently put to any use, but ostensibly held for a future use, qualifies for a statutory tax exemption. Because the law and the facts at issue in *Traverse City* and *Blondell* were the same as in the present case, this Court's decisions in those cases control, or at least provide significant guidance as to, the instant matter.

In *Traverse City*, this Court held that "the use which warrants exemption mentioned in the [predecessor version of MCL 211.7m] is a present use, and not an indefinite prospective use." *Traverse City, supra*, at 331. Likewise, in *Blondell*, this Court ruled that:

The exemption of property from taxation, made contingent upon use for public purposes, does not extend to a future intended use but is limited to present use.

The rule is stated in 2 Cooley on Taxation (4th Ed.), §687:

'An intention to use property at some uncertain time in the future, for purposes which will render it exempt from taxation under the laws of the State, does not preclude its taxation before actually used for the purpose warranting an exemption. If the use determines the right to exemption, it is the present use and not the intended use in the future which governs.'

The intent to use the property for school purposes does not meet the exemption condition of being presently used for public purposes.

The language of the statute is plain, and requires no construction or citation of authority. *Blondell, supra*, at 527.

Although, like MCL 211.7m, its statutory predecessor did not contain express language requiring a "present use," this Court twice held that such a requirement existed.

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In an unpublished opinion, the Michigan Court of Appeals analyzed MCL 211.7m's public use requirement and concluded that it would be rendered meaningless if a public entity could receive a tax exemption merely for owning land with an intent to use it for a public purpose in the future. *Rochester Hills Pub Library v Rochester Hills*, unpublished opinion *per curiam* of the Court of Appeals, decided October 3, 1997 (Docket No. 196077) (a copy of which is attached hereto as **Attachment A**). In that case, a public library acquired land for a new building. Before construction plans were approved, however, the city council passed a new wetlands ordinance that prohibited construction on the property. Accordingly, the new building was constructed at a different location. Like MERS' investment property, the land that the library originally intended to build upon sat vacant.

The library argued, pursuant to MCL 211.7m, that the land was exempt from taxation because it was held "for an unspecified future use." Citing *Traverse City*, the Court of Appeals disagreed.

Plaintiff's interpretation of § 7m is unacceptable because it would render the public use requirement meaningless. *Altman v Meridian Twp*, 439 Mich 623, 635; 487 NW2d 155 (1992). Had the Legislature intended to provide a blanket exemption for all land owned by entities such as plaintiff, it clearly would have done so. However, it chose to exempt only that land "used to carry out a public purpose."

The Court of Appeals also compared the language of MCL 211.7m with its statutory predecessor, cited by this Court in *Traverse City* and *Blondell*, and concluded that the wording is virtually the same with regard to the exemption requirement.

In *Traverse City v East Bay Twp*, 190 Mich 327; 157 NW 85 (1916), our Supreme Court reached a similar result with regard to vacant land held for future use under the statutory predecessor to § 7m, which exempted from taxation "lands owned by any county, township, city, village or school district and buildings thereon, used for public purposes." *Id.* at 328. Plaintiff has not carried its burden of proof to

demonstrate why a different result should obtain under revised § 7m, which contains virtually the same wording with regard to the exemption requirement. Consequently, we find that the tax tribunal did not err in holding that plaintiff was not entitled to an exemption under that statute. *Id.* at 3-5.

MERS' attempts to distinguish MCL 211.7m from its statutory predecessor and thereby limit the applicability of this Court's decisions in *Traverse City* and *Blondell* should be rejected.

Contrary to MERS' assertions, Delta Township does not advocate a strained interpretation of MCL 211.7m, nor does it seek to add additional words or meaning to the statute. In further contrast to MERS, Delta Township does not give short shrift to this Court's precedent. Instead, Delta Township simply urges this Court to follow the clear rule of law established by its own precedent, which has long guided the courts of this state, as well as clear language and purpose of MCL 211.7m.

RELIEF REQUESTED

Delta Township respectfully requests that this Court deny MERS the exemption from ad valorem taxation for its investment property under MCL 211.7m, reverse the Michigan Court of Appeals' decision in this case, and affirm the Michigan Tax Tribunal's Order granting summary disposition in favor of Delta Township.

Respectfully submitted,

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Dated: May 23, 2006

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**ROCHESTER HILLS PUBLIC LIBRARY, Plaintiff-Appellant, v CITY OF
ROCHESTER HILLS, Defendant-Appellee.**

No. 196077

COURT OF APPEALS OF MICHIGAN

1997 Mich. App. LEXIS 2316

October 3, 1997, Decided

NOTICE: [*1] IN ACCORDANCE WITH THE MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

PRIOR HISTORY: Michigan Tax Tribunal. LC No. 00215037.

DISPOSITION: Affirmed.

JUDGES: Before: Kelly, P.J., and Reilly and Jansen, JJ.

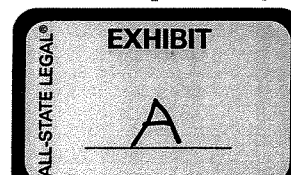
OPINION: PER CURIAM.

Plaintiff Rochester Hills Public Library appeals by right from the opinion and judgment of the Michigan Tax Tribunal rejecting the decision of the small claims division and holding that plaintiff was not entitled to claim an exemption under either *MCL 211.7m* or *211.7n*; *MSA 7.7(4j)* or *7.7(4k)* of the General Property Tax Act for tax years 1994 and 1995. We affirm.

Plaintiff purchased the land in question in 1988 for the purpose of building a new main library. The property is vacant and consists of 9.6 acres. The plans for the library building were approved by the planning commission in 1990, but before the plans could be scheduled for review by the Rochester Hills City Council, the council passed a wetlands ordinance prohibiting any improvements from being built within forty feet of a wetland area. The previous ordinance imposed a twenty-five foot ban. Plaintiff claimed this change blocked [*2] ingress and egress from the property. As a result, the proposed library was built on another piece of property located approximately one mile south of the property at issue. In 1994, defendant City of Rochester Hills placed the subject property on the tax rolls for the first time since its purchase in 1988.

Plaintiff appealed the assessments for 1994 and 1995 to the small claims division of the Michigan Tax Tribunal, arguing that the property was exempt from taxation under *MCL 211.7m*; *MSA 7.7(4j)*, which exempts property owned or being acquired by a public entity where the property is used for a public purpose. Plaintiff claimed that holding the property for future use or liquidation was within the definition of public purpose. The hearing referee found that the applicable statute was *MCL 211.7n*; *MSA 7.7(4k)*, not § 7m. Section 7n specifically exempts from taxation property that is "owned and occupied" by, among other things, nonprofit library institutions. The hearing referee found that plaintiff's property was exempt from taxation for the years at issue because, during the relevant time, the property was owned by plaintiff and was [*3] "being solely occupied by Petitioner, although still vacant, because the Petitioner alone [has the power to determine] . . . the use to which the subject lot shall be put." On rehearing, the tax tribunal vacated the judgment of the hearing referee and found that the property was not exempt under either § 7m or 7n because plaintiff did not use the property for a public purpose or occupy the property during the relevant tax period.

In general, tax exemption statutes must be strictly construed in favor of the taxing unit. *DeKoning v Dep't of Treasury*, 211 Mich App 359, 361-362; 536 NW2d 231 (1995). *MCL 211.7m*; *MSA 7.7(4j)* provides in relevant part that "property owned . . . or being acquired by an agency, authority, instrumentality, nonprofit corporation, commission, or other separate legal entity . . . whose members consist solely of a political subdivision . . . and [which] is used to carry out a public purpose . . . is exempt from taxation." The tax tribunal found that plaintiff "conceded at the hearing on this matter that the subject property is and was vacant and was not in any use, public or otherwise, during the tax years [*4] at issue." Plaintiff argues, as it did in the administrative proceedings, that



holding the property for an unspecified future use constitutes use of the property for a public purpose.

Plaintiff's interpretation of § 7m is unacceptable because it would render the public use requirement meaningless. *Altman v Meridian Twp*, 439 Mich 623, 635; 487 NW2d 155 (1992). Had the Legislature intended to provide a blanket exemption for all land owned by entities such as plaintiff, it clearly would have done so. However, it chose to exempt only that land "used to carry out a public purpose." In *Traverse City v East Bay Twp*, 190 Mich 327; 157 NW 85 (1916), our Supreme Court reached a similar result with regard to vacant land held for future use under the statutory predecessor to § 7m, which exempted from taxation "lands owned by any county, township, city, village or school district and buildings thereon, used for public purposes." *Id.* at 328. Plaintiff has not carried its burden of proof to demonstrate why a different result should obtain under revised § 7m, which contains virtually the same wording with regard to the exemption requirement. [*5] Consequently, we find that the tax tribunal did not err in holding that plaintiff was not entitled to an exemption under that statute.

MCL 211.7n; MSA 7.7(4k) provides an exemption for "real estate or personal property *owned and occupied* by nonprofit theater, library, educational, or scientific institutions incorporated under the laws of this state with the buildings and other property thereon *while occupied by them* solely for the purposes for which the institutions were incorporated." (Emphasis added). A claimant seeking an exemption under this provision must establish the following elements:

(1) The real estate must be owned and occupied by the exemption claimant;

(2) The exemption claimant must be a library, benevolent, charitable, educational or scientific institution;

(3) The claimant must have been incorporated under the laws of this state;

(4) The exemption exists only when the buildings and other property thereon are occupied by the claimant solely for the purposes for which it was incorporated. [*Ladies Literary Club v Grand Rapids*, 409 Mich 748, 751; 298 NW2d 422 (1980); *Ass'n of Little Friends, Inc v Escanaba*, 138 Mich App 302, 306; [*6] 360 NW2d 602 (1984).]

There is no dispute that plaintiff satisfies elements (2) and (3). However, the statute clearly requires occupation by the claimant. In this case, plaintiff has admitted that the property was vacant at all relevant times. According to Webster's dictionary, a synonym for "vacant" is "unoccupied." Webster's New Twentieth Century Unabridged Dictionary (2d ed), p 2014.

To hold, as the hearing referee did, that the owner's right to control the property is synonymous with occupation of the property would render nugatory the statutory language requiring that the property be occupied, as that term is commonly understood. See *Altman, supra* at 635; MCL 8.3a; MSA 2.212(1); *In re PSC's Determination Regarding Coin-Operated Telephones, No 2*, 204 Mich App 350, 353; 514 NW2d 775 (1994). Therefore, because plaintiff did not occupy the property during the tax years at issue, the tax tribunal did not err when it vacated the hearing referee's judgment and ruled that plaintiff was not entitled to claim an exemption under § 7n.

Affirmed.

/s/ Michael J. Kelly

/s/ Maureen Pulte Reilly [*7]

/s/ Kathleen Jansen